IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 615

RALPH BERGER,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner, Ralph Berger, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on July 8, 1966.

Opinions Below

There is no written opinion by any of the Courts below. In the Court of Appeals of the State of New York, where there was an affirmance without opinion, Chief Judge Desmond and Judge Fuld dissented in an opinion which is reported in 18 N. Y. 2d 638, 640. The "memorandum" report of the affirmance (without opinion) by the Court of Appeals is reported in 18 N. Y. 2d 638. The latter "memorandum", including the dissenting opinion of Chief Judge Desmond and Judge Fuld, is printed in Appendix B

hereto, *infra*. The "memorandum" report of the affirmance without opinion by the Appellate Division, First Department, Supreme Court of New York, is reported in 25 A. D. 2d 718.

Jurisdiction

The order (remittitur) of the Court of Appeals of the State of New York here sought to be reviewed was dated July 7, 1966 (Appendix A hereto, *infra*). That order affirmed, without opinion, a judgment of the Appellate Division of the Supreme Court of New York, First Department, entered March 17, 1966, which had affirmed a judgment of the Supreme Court of New York, New York County, upon a verdict convicting the within petitioner Ralph Berger on two counts of conspiracy to bribe a public official.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fourth Amendment search and seizure, Fifth Amendment self incrimination, Sixth Amendment right to counsel, Fourteenth Amendment due process) and under 47 U.S.C. § 605, and since there is necessarily drawn in question the validity of a State statute (N. Y. Code Crim. Proc. § 813-a —*ex parte* eavesdrop orders) on the ground of its being repugnant to the Constitution of the United States and to 47 U.S.C. § 605.

Questions Presented

Petitioner was convicted of conspiracy to bribe the Chairman of the New York State Liquor Authority. The State prosecutive authorities have stipulated that without the leads and evidence obtained through certain electronic eavesdrops of the "room" or "bug" type, petitioner could not have been indicted, prosecuted or convicted. The questions are:

1. Assuming the basic Federal Fourth and Fifth Amendment constitutionality of New York State's permissive eavesdrop legislation which allows electronic room eavesdropping or "bugging" by *ex parte* Court order (N. Y. Code Crim. Proc. § 813-a), were the *ex parte* Court orders for the room eavesdrops in this particular case, without which this prosecution stipulatedly could not have been instituted or maintained, nevertheless invalid under the Fourth Amendment because not based upon an adequate showing of probable cause?

2. Is the New York *ex parte* permissive eavesdrop legislation (N. Y. Code Crim. Proc. § 813-a) unconstitutional under the Federal Fourth, Fifth and Fourteenth Amendments as setting up a system which intrinsically involves trespassory intrusion into private premises, "general" searches for "mere evidence" and invasion of the privilege against self incrimination; and were the particular room eavesdrops here involved unconstitutional on those grounds?

3. Was the by-product eavesdropping of telephone conversations during the course of the room eavesdrops likewise unconstitutional as an integral part of the unconstitutional room eavesdrops and as a violation of the Federal Communications Act (47 U.S.C. § 605)? Must not the telephone eavesdrops fall together with the room eavesdrops owing to the practical and technological impossibility of segregating the "evidentiary" products of these two respective forms of eavesdrops when they are conducted simultaneously in the same room space so as to include necessarily within the room eavesdropping the eavesdrop auditing of the words spoken on the telephones by persons present in that room space?

4. Was petitioner denied due process of law under the Fourteenth Amendment by the reception in evidence at his trial of inaudible and garbled but tendentious eavesdrop

recordings which had been obtained by the unconstitutional means above mentioned, and whose pervasive inaudibility and garbled condition led to the use also at the trial of alleged "transcripts" of the eavesdrop recordings which had been developed by the police in an evidentially synthetic and otherwise unsatisfactory manner?

5. Was petitioner denied a fair due process trial and his Federal constitutional rights to counsel and to be free of unreasonable search and seizure and self incrimination, by the admission in evidence of allegedly incriminating papers seized while he was under unlawful custody in the absence of his counsel? Was it error to rule that no issue of *search* or other involuntariness was presented because petitioner's attempts to destroy and conceal the papers (by surreptitiously tearing them and by hiding them) constituted an "abandonment" of the papers?

6. Was petitioner denied a due process fair trial by the reception of testimony from co-conspirators that they had invoked the privilege against self incrimination before the Grand Jury, these co-conspirator witnesses having been recalled to the stand by the prosecutor for the express purpose of eliciting such testimony?

Constitutional Provisions and Statutes Involved

The case involves the Fourth Amendment (search and seizure), the Fifth Amendment (self incrimination), the Sixth Amendment (right to counsel), and the Fourteenth Amendment (due process) of the United States Constitution. It also involves 47 U.S.C. § 605 (wiretapping).

The State statutory provisions are N. Y. Code Crim. Proc. § 813-a, authorizing *ex parte* judicial orders for eavesdropping; and N. Y. Code Crim. Proc. §§ 813-c to e, motion to suppress evidence. These provisions are printed in Appendix E hereto, *infra*. (The State statutes whose

violation is charged in the indictment, N. Y. Penal Law §§ 378 (bribery) and 580 (conspiracy) are not printed herein because no issue relating thereto is involved in this petition for certiorari.)

Statement of the Case and of How the Federal Questions Are Presented*

Petitioner was indicted (A2 *et seq.*) on two counts of conspiracy to bribe Martin C. Epstein, Chairman of the New York State Liquor Authority (bill of particulars, A16-A20, A43-A45). The conspiracy was alleged to have occurred during May and June 1962. The first count involved an alleged bribe in connection with a liquor license for a place called the Tenement Club, owned by Frank Jacklone. The second count involved a bribe in connection with the Playboy Club liquor license in New York City. Petitioner's alleged role was that of a go-between. Petitioner was the only alleged conspirator named in the indictment and he was tried alone; other co-conspirators were named in a bill of particulars (A16).

During proceedings at the outset of petitioner's trial, on a motion to suppress eavesdrop evidence,** the prosecu-

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* Petitioner printed an extensive "Appendix to Appellant's Brief" in the Court below, two volumes, 1037 pages, nine extra copies of which are filed herewith. Petitioner also printed in the Appellate Courts below a separate smaller volume of twelve pages, captioned in the Appellate Division, First Department, and entitled "Certificate of Reasonable Doubt and People's Exhibits 1 and 2", nine extra copies of which are also filed herewith. In the latter printed item, People's Exhibits 1 and 2 are the *ex parte* eavesdrop orders and the affidavits upon which those orders were procured. Our references herein to the above mentioned printed two-volume Appendix will appear as "A ". Our references herein to the above mentioned separate printed item containing the eavesdrop orders, etc., will appear as "Supp. App. ". The foregoing, together with the materials printed in the Appendix hereto, *infra*, contain everything needed for consideration of the issues in this petition for certiorari, except the eavesdrop recordings themselves and the police transcripts of those recordings, and we are endeavoring to obtain release of those exhibits for filing in this Court.

** The motion was denied (*infra*).

tor and defense counsel entered into the following stipulation on the record (A79-A80):

> "* * * that without the evidence, or the leads obtained, the evidence obtained through and the leads obtained from, the eavesdropping devices placed in the two addresses, specified in Exhibits 1 and 2, the District Attorney had no information upon which to proceed to present a case to the Grand Jury, or on the basis of which to prosecute this defendant for the crimes charged in the indictment at bar now, and that all of the evidence and the leads obtained, offered by the District Attorney to the Grand Jury, and sought to be offered upon the trial of this (48) indictment, if it is obliged to go to trial, were so obtained from such eavesdropping activities on the part of the District Attorney and his agents and that all the evidence and all the leads were derived therefrom."

(The Exhibits 1 and 2 referred to in the above quoted stipulation will be described *infra*.)

On the basis of this stipulation the defense repeatedly moved, throughout the trial (e.g. A463-465, 477-478, 483, 490, 496-498, 535-536, 551), under what came to be referred to in this Record as "the general objection", against the admission in evidence of each item of proof offered by the People which, concededly (pursuant to the stipulation), derived lead-wise from the eavesdrops referred to in the stipulation. This "general objection" by the defense, if it had been sustained—as it concededly should have been if the eavesdrops referred to in the stipulation were unconstitutional or illegal for the reasons which we shall mention—would concededly have required a dismissal of the indictment.

As seen, the stipulation refers to "the eavesdropping devices placed in the two addresses, specified in Exhibits 1 and 2". Exhibit 1 (see A54-55 and Supp. App. 3 *et*

seq.) was an *ex parte* court order plus the affidavits constituting the application for said order, authorizing a "room" eavesdrop in the office of an attorney, Harry Neyer, at 22 West 48th Street, Manhattan; this order was signed on April 10, 1962 by Judge Joseph A. Sarafite; the affidavits were, respectively, by Assistant District Attorney Jeremiah B. McKenna, and Assistant District Attorney Alfred J. Scotti, both sworn to April 5, 1962. The "Exhibit 2" referred to in the stipulation (Supp. App. 8 *et seq.*) consisted of an *ex parte* court order and affidavits for a room eavesdrop in the office of Harry Steinman at 15 East 48th Street, Manhattan, this order being also by Judge Sarafite, signed June 12, 1962 and the affidavits being respectively by Assistant District Attorneys David A. Goldstein, and Alfred J. Scotti, both sworn to June 11, 1962.

The earlier of the above two eavesdrops, the one in the office of attorney Harry Neyer, was claimed by the prosecution to have produced leads which were relied upon by the prosecution to obtain the subsequent *ex parte* eavesdrop order for the office of Harry Steinman (details *infra*). The prosecution also claimed that the eavesdropping in the office of attorney Harry Neyer had in turn been preceded by minifon-recorded conversations between a liquor licensee named Panzini and Albert Klapper (an aide of Chairman Epstein of the State Liquor Authority) and Mr. Neyer (A55-A60, A85-A88).

The eavesdrop proofs which were introduced in evidence against petitioner Berger at his trial consisted of the playing of a tape recording (People's Exhibit 61-A, also referred to in the record as Reel 5483—played at A765 *et seq.*) which purported to be an eavesdrop recording of conversations in the office of the above-mentioned Harry Steinman at 15 E. 48th Street, Manhattan, on June 28 and 29, 1962. The June 28 conversation purported to be between the petitioner Berger and Steinman; the June

29 conversation between Berger, Steinman and liquor-license applicant Jacklone. The People contended that the conversation of June 28 contained probatively recognizable and material references to the Playboy situation involved in this case (Count 2) and to Berger's alleged dealings with Epstein, plus reference to the Jacklone (Tenement Club) situation (Count 1); and that the June 29 recording related to the Jacklone situation.

The Steinman eavesdrop proofs were received in evidence after the Trial Court had denied our motion to suppress (A97). In essence, the grounds of our motion to suppress (A15-A97) were that eavesdropping had occurred in this case in constitutionally protected areas, viz., the respective private office premises of Attorney Harry Neyer and of Harry Steinman, amounting to a trespassory intrusion in violation of the Federal Fourth, Fifth and Fourteenth Amendments; and that, in the nature of such a trespassory eavesdropping intrusion, as well as in the light of the type of eavesdropping referred to in the language of the State's permissive *ex parte*-court-order eavesdropping statute (N. Y. Code Crim. Proc. § 813-a) which permits eavesdropping upon a showing, *inter alia*, that "evidence of crime may thus be obtained", the eavesdropping was unconstitutional for the further reason that it was not a search for fruits or instrumentalities of crime such as is permitted under the search warrant procedure of the Fourth Amendment, but was a search for mere evidence in the prohibited sense of the traditionally forbidden "general warrant".

We also urged that the *ex parte* eavesdrop orders had not been based upon an adequate showing of probable cause (or "reasonable grounds", the language of N. Y. Code Crim. Proc. § 813-a); this issue is further discussed *infra*.

The facts as to the audibility of the Steinman eavesdrop recording (and as to the authenticity of the police-derived stenographic transcripts thereof), as to the seizure of papers from petitioner Berger, and as to the testimony by

co-conspirators that they had invoked the privilege against self incrimination before the Grand Jury, will be noted at appropriate places *infra* under our "Reasons".

Petitioner Berger was convicted in the Supreme Court of New York, New York County (Schweitzer, J.), after a jury trial, under both counts of the indictment (A915). He was sentenced to one year on each count, to run concurrently (A932). On appeal to the Appellate Division of the Supreme Court of New York, First Department, the judgment of conviction and sentence was unanimously affirmed, without opinion (A1036). The Federal constitutional points urged on petitioner Berger's behalf in the Appellate Division are set forth in Appendix C hereto, *infra* (quoted from the Table of Contents of the printed "Appellant's Brief" in the latter Court). On appeal to the Court of Appeals of the State of New York, the judgment of affirmance of the Appellate Division was affirmed without opinion, Chief Judge Desmond and Judge Fuld dissenting in the following memorandum (18 N. Y. 2d 638, 640; Appendix B hereto, *infra*):

> "Chief Judge DESMOND and Judge FULD dissent and vote to reverse on the ground that the electronic eavesdrops inside two offices, one of which was a law office, were unconstitutional under the Fourth Amendment and a physical intrusion into private premises and as a 'general search' for evidence. (See *Siegel* v. *People*, 16 N Y 2d 330, 333, per DESMOND, Ch. J. [dissenting]; *People* v. *McCall*, 17 N Y 2d 152, 161, per DESMOND, Ch. J. [concurring]; *People* v. *Grossman*, 45 Misc 2d 557; cf. *Stanford* v. *Texas*, 379 U. S. 476; *Silverman* v. *United States*, 365 U. S. 505.)"

The Federal constitutional points urged on petitioner Berger's behalf in the Court of Appeals are set forth in Appendix D hereto, *infra* (quoted from the Table of Contents of the printed "Appellant's Brief" in the latter Court).

Reasons for Granting the Writ

I

This case of trespassory electronic room eavesdropping or "bugging" reaches this Court with the issue of the Federal constitutionality of such eavesdropping presented in the manner which classically renders the issue ripe for certiorari review. The petitioner Berger has been convicted and sentenced in a State criminal prosecution which, *stipulatedly,* could not have been instituted or maintained without the electronic eavesdrops; and the highest State appellate Court has affirmed the judgment of conviction and sentence, with two Judges of that Court dissenting explicitly on the ground of the Federal unconstitutionality of the eavesdropping.

Nor does the case involve any fine-line question of physical "trespass" *vel non,* because it is undisputed that the room or "bug" type of electronic eavesdrop here used was effected by installing a concealed microphone or "bug" in the respective rooms, that the method of hooking up the "bug" for transmission of sound to the recording device in a nearby building was by wiring the bug to unused telephone wires found in the room, that installation of the "bug" required secret physical entry into the room, and that at least one of the police wiremen made at least one subsequent entry into the "bugged" area (A551-A552, A557-A560, A567-A572).

Unless the existence of New York State's permissive *ex parte* eavesdrop legislation (N. Y. Code Crim. Proc. § 813-a) and the resort which was here had to the processes of that legislation by the New York police may justify a different constitutional conclusion, the electronic eavesdrops here involved fall under the ban of *Silverman* v. *United States,* 365 U. S. 505 and *Clinton* v. *Virginia,* 377 U. S. 168. See also *Wong Sun* v. *United States,* 371 U. S. 471, 485 ("* * * It follows from our holding in Silverman

v. United States, * * * that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects'."). The Fourth Amendment considerations apply, needless to say, to State action of the kind here involved. *Mapp* v. *Ohio,* 367 U. S. 643; *Clinton* v. *Virginia, supra.*

We take it that the granting of certiorari in *Osborn* v. *United States,* 382 U. S. 1023, indicates a renewed disposition by this Court to consider constitutional disapproval of even the "non-trespass" types of secret electronic intrusion, of which the minifon device is the characteristic instrumentality that has heretofore been approved in cases like *On Lee* v. *United States,* 343 U. S. 747.

In the Courts below, the State prosecutive authorities urged that the electronic room eavesdropping here involved was saved from unconstitutionality by the fact that it was done pursuant to *ex parte* judicial permission under N. Y. Code Crim. Proc. § 813-a; and while neither the Appellate Division nor the majority Judges of the Court of Appeals gave a written explanation of their reasons for affirming the within conviction notwithstanding its stipulatedly indispensable dependence on the trespassory eavesdrops, the dissenting opinion of Chief Judge Desmond and Judge Fuld of the Court of Appeals denotes that the issue which divided the latter Bench in regard to the eavesdrops was whether *any* State system of permissive electronic room eavesdropping can be constitutional under the Fourth Amendment.

We realize that this Court has not yet ruled on the latter issue, and that the expressions on the subject by several of the Justices in *Lopez* v. *United States,* 373 U. S. 427 and in the *Silverman* case, *supra,* did not constitute a ruling by the Court itself. This case, however, squarely and inescapably presents the issue, at least it presents the issue in the following form: Is N. Y. Code Crim. Proc. § 813-a, which permits electronic room eavesdropping by *ex parte* judicial order upon a showing of "reasonable ground to

believe that evidence of crime may be thus obtained", constitutional under the Fourth Amendment as here applied?

Chief Judge Desmond and Judge Fuld, dissenting below, have in effect answered the question in the negative, with particular reference to the constitutional vice of a " 'general search' for evidence" (Appendix B hereto, *infra*). In a prior recent decision, *Siegel* v. *New York*, 16 N. Y. 2d 330, cert. denied 16 L. Ed. 2d 682, where the same New York permissive legislation was involved with respect to electronic room eavesdropping, and where the Fourth Amendment issue was not even yet ripe for final review as is the case here, Chief Judge Desmond wrote a dissenting opinion (concurred in by Judges Fuld and VanVoorhis) stating similar constitutional views at greater length (16 N. Y. 2d at 334-336).

Similarly in *People* v. *McCall*, 17 N. Y. 2d 152, 269 N.Y.S. 2d 396, 404-405, which involved wiretapping rather than room "bugging", Chief Judge Desmond, concurring for reversal of a judgment of criminal conviction, denounced all electronic eavesdropping on the ground, *inter alia*, of its "general search" character. Judge Fuld, in a separate concurring opinion in the *McCall* case, *supra*, finding that the affidavits in support of the wiretap order there involved were inadequate, and noting also that he adhered to his dissent in *People* v. *Dinan*, 11 N. Y. 2d 350, 357 (that State wiretapping violates the Federal Communications Act), stated that, "In this view, I also find it unnecessary to reach or consider the broad constitutional issue discussed by the Chief Judge" (269 N.Y.S. 2d at 403).

It may be mentioned also that on the same day on which the Court of Appeals decided the instant case (July 8, 1966), Chief Judge Desmond and Judge Fuld again expressed their constitutional disapproval of any New York State wiretapping by reason of the Federal Communications Act. *People* v. *Cohen*, 18 N. Y. 2d 650, 651.*

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*We are advised that a petition for certiorari is being filed in *People* v. *Cohen*, *supra*.

We are calling attention to these several recent indications of ferment among the New York State Judiciary on the subject of electronic eavesdropping (including both room "bugging" and wiretapping) because we respectfully think that it is proper to refer to these developments where, as here, a party is requesting the highest Court in the land to make an important new judgment of constitutional policy—i.e., to adjudge that State permissive legislation will not at all necessarily avail to take State electronic room "bugging" outside the ban of the Fourth Amendment.

The foregoing does not exhaust the instances of recent dissatisfaction with electronic eavesdropping in authoritative official quarters in New York State. In *People* v. *Leonard Grossman*, 45 Misc. 2d 557 (S. Ct. Kings Co. 1965), a noted judicial scholar, Justice Nathan Sobel, after referring to the decisions of this Court which forbid a search for "mere evidence"*, announced the reasoned conclusion that the statute here involved (N. Y. Code Crim. Proc. § 813-a) is unconstitutional:

> "* * * It seems absolutely clear from the foregoing authorities that a search and seizure of *tangibles* which are *mere evidence* and a search and seizure of *intangibles* in the nature of conversations or verbal statements would violate the Fourth and Fifth Amendments. It follows that no state statute could authorize a violation of the United States Constitution. To the extent that sections 792 and 813a of the Code of Criminal Procedure purpose to do so these statutes are unconstitutional." (Italics in original.)**

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* Justice Sobel cited *Gouled* v. *United States*, 225 U. S. 298, and the dissenting opinion of Mr. Justice Brennan in *Lopez* v. *United States*, 373 U. S. 427, where the authorities for the "mere evidence" principle are collected and discussed.

** Justice Sobel's opinion in the *Grossman* case, *supra*, is cited with approval in the dissenting opinion in the instant case by Chief Judge Desmond and Judge Fuld of the Court of Appeals (Appendix B hereto, *infra*).

See also *People* v. *Rial*, 25 A. D. 2d 28, 266 N.Y.S. 2d 426 (4th Dept. 1966), which reversed a conviction based upon electronic "bugging" of defendant's hospital room.

See also the illuminating discussion in the *Symposium, Constitutional Problems In The Administration Of Criminal Law*, the portion entitled "*Electronic Eavesdropping: Can It Be Authorized?*", Northwestern Univ. L. Rev., vol. 59 (Nov.-Dec. 1964), at pp. 639-640, where the authors were particularly discussing the statute here involved, N. Y. Code Crim. Proc. § 813-a:

> "The last, and most likely to prove fatal, objection to the constitutionality of the statute is the requirement that a warrant particularly describe the things to be seized. It seems unlikely if not impossible for conversation to be particularly described. Even if one could adequately describe the conversations sought, the search, of necessity, would go far beyond what is described, for eavesdropping is of its nature indiscriminate. Innocent, as well as incriminating conversations would be overheard. The rights of those innocent parties who converse with the suspect, or for that matter with anyone on the tapped wire or the 'bugged' premises, will be subjected to invasion of privacy. True, the usual search for tangible evidence often will invade the rights of innocent parties, but the search for conversation, often requiring long periods of auditing, does so almost inevitably." (Footnotes omitted)

The commonly termed "mere evidence" problem merges with the concept of the prohibited "general search". (See the recent denunciation of the odious "general search" in *Stanford* v. *Texas*, 379 U. S. 476.) There can exist no "probable cause" to arrest or to search for mere "future" crimes, and the entire corpus of the law of "probable cause" does not go beyond "past" or "present" crimes. E.g., *Brinegar* v. *United States*, 338 U. S. 160, 175-176.

It is of the very essence of the constitutional law of unreasonable search and seizure, as such would sensibly apply to room eavesdrop "searches," that such may constitutionally be permitted (if at all) only upon a showing which meets the tests of "probable cause" to believe that a crime has been committed or is being committed.* And even so, there remains the extremely disturbing constitutional question as to whether *any* search for *mere evidence* (as distinct from fruits and instrumentalities of a crime) may be permitted—much less the outright dragnet kind of "search" involved in this case. See our last preceding footnote.

If a search for "mere evidence" is unconstitutional, then it follows, for our case, that the language in the eavesdrop statute (§ 813-a) permitting a room eavesdrop upon "reasonable ground to believe that *evidence* of crime may thus be obtained" is unconstitutional *on its face* if such be construed to allow room eavesdropping for any purpose which would not be strictly analogous to a search for "fruits and instrumentalities" of crime—or, at most, for proof that a crime is presently being committed.

Furthermore, the same unreasonable act of search which violates a citizen's right of privacy under the Fourth Amendment may and usually does simultaneously violate his privilege against self-incrimination under the Fifth Amendment.** *Boyd* v. *United States,* 116 U. S. 618; *Gouled* v. *United States,* 255 U. S. 298; and see Mr. Justice Brennan's dissent in *Lopez* v. *United States,* 373 U. S. 427. It is above all in the area of electronic eavesdropping that this interplay between unreasonable invasion of individual privacy and breach of the privilege against self-incrimination tends naturally to achieve its most vicious and intense form.

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* We show *infra* that the "mere evidence" test in the present case is only the beginning of the Fourth Amendment "search" problem because as to Petitioner Berger the eavesdrop application and orders operated in sheer dragnet fashion.

** See *Malloy* v. *Hogan,* 378 U. S. 1.

The inescapable constitutional infirmity in any system of court-permitted electronic eavesdropping is its intrinsic "general search" character, which must inevitably attach to *any* act or situation of electronic eavesdropping. Unlike a search under a search warrant where the things to be seized are explicitly described (as required by the Fourth Amendment), the eavesdropping electronic device conveys to the recording instrument or to the human monitor-auditor everything that is said in the eavesdropped room space.

In the Courts below the prosecution sought to justify the intrinsic and inevitable "general search" character of room-eavesdropping by the analogy of the police searcher who must sift through innocuous materials in order to find the "specific" items allowed by the search warrant. This amounts to suggesting that private individuals should accept the company (undisclosed and furtive) of police electronic auditors in their private homes and business places because the police eavesdroppers will be cocking their ears or animatedly alerting themselves only for "crime" during the continuous auditory surveillance. This amazing idea finds "precedent" in one "authority" that has come to our attention, namely, the late George Orwell's "1984", where everyone's home contained visual and auditory electronic installations by which "Big Brother" could keep himself continually apprised of all or any happenings in the private premises of the citizenry.

It is worth examining in a little more detail this astounding suggesting that the private citizen ought not to mind living his private life in his private premises under the ever overhanging presence of the electronic police eye and ear, because in that way "crime" may be better detected. Who among us would knowingly accept such an atrocious invasion of our private homes and business places? Who among us would be consoled, in accepting such an insulting and intolerable intrusion upon our private lives, by the reassurance that the secret eavesdropper's

attention would not be focused upon us in a "specific" way until we spoke a "criminal" word or did a "criminal" deed?

The foregoing is, in effect, the prosecution's own choice, in this case, in the Courts below, as to the best means of formulating the argument in favor of the electronic "general search" pretensions of the mid-Twentieth Century American police mentality. This draws the issue with unmistakable clearness. It is the issue of whether higher value attaches to individual right and freedom in our society, or to the interests of police enforcement of the criminal laws. The extreme logic of the position preferred by the prosecutive authorities in this case—that policing comes ahead of human private dignity—is, in fact to be welcomed, because it shows to us, to all of us, to Judges and to lawyers and to laymen, where all this leads. Again, we respectfully say that where "all this leads" is, literally, to "1984".

* * * * *

We are aware that the "mere evidence" rule of this Court has been producing some disaffection lately in Courts of some States, but notwithstanding cases like *State* v. *Bisaccia*, 45 N. J. 504, 213 A. 2d 185 and *People* v. *Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, we venture to say that *Gouled* v. *United States*, 225 U. S. 298, is still the law. *Cf. Schmerber* v. *California*, —— U. S. ——, 16 L. Ed. 2d 908, 918 fn. 10.

We have one further observation with regard to the "mere evidence" problem, and it relates to the specific factual way in which that problem takes form on the record of the instant trial. As the Court may see if it examines the eavesdrop proofs as introduced into evidence in this case in the garbled and virtually incoherent stenographic transcriptions thereof at A765 *et seq.* (and see "IV." in these "Reasons", *infra*), the only "evidence" in regard to the alleged Playboy conspiracy was an incidental comment about the Playboy enterprises having wanted a pri-

vate membership key system. In other words, this item was in the most classic and "merest" sense an item of "mere evidence" of a merely tendentiously "corroborative" kind, amounting at most (and only in the remotest way) to some kind of supposed expression of "guilty knowledge". Moreover, this "Playboy" eavesdrop item, which dates from June 28, 1962, was undisputedly *after* the substantial completion of the alleged Playboy conspiracy phase. In short, the eavesdrop "evidence" in this case concerning the Playboy phase, inflammatory and fatally damaging though it was from the standpoint of the jurors in this lurid case, was at the same time, in terms of the test of "mere evidence" (as distinct from evidence of the fruits or instrumentalities of crime or evidence of crime being presently committed), a classic example of the "seizure" of oral "evidence" whose constitutional unfairness is condemned by the "mere evidence" test. Likewise, as regards the Jacklone-Tenement Club phase of this case, the eavesdrop proofs (A765 *et seq.*), again, relate to a stage of the alleged conspiracy when all of the essential conspiratorial steps had been completed, except one, namely, the paying over of the balance of the alleged bribe money. Here again, then, is a classic instance of "mere evidence" to prove an alleged offense that has already in substance been committed, as distinct from the obtaining of fruits or instrumentalities of the crime, or the obtaining of proof of a crime being "presently" committed.

We shall return to the topic of the Fourth Amendment acceptability of the New York State permissive room eavesdrop legislation as here applied, after noting the following additional distinct "Reasons" for certiorari which also relate to the latter topic.

II

In any particular instance where it is claimed by State prosecutive officials, as here, that a permissive State eavesdrop statute has been applied in such manner as to comply

with the Fourth Amendment, it should be shown at the very least that the Fourth Amendment requirement of probable cause has been satisfied. Our discussion *supra* of the inter-related problems of "mere evidence" and "general search" indicates the larger doctrinal difficulties that must be overcome in satisfying the probable cause requirement at all in any imaginable electronic "search" of human conversations extending over a period of time in a particular room. But leaving aside these larger doctrinal difficulties, there remain the quite specific Fourth Amendment questions, acutely presented on the record in this case, of just what information was in fact presented to the "magistrate" in support of the application for permission to "search", and of whether "reason for crediting the source of the information [was] given". E.g., *Aguilar* v. *Texas,* 378 U. S. 108; *United States* v. *Ventresca,* 380 U. S. 102, 109. The "reasonable grounds" requirement of N. Y. Code Crim. Proc. § 813-a is undisputedly equivalent to the probable cause requirement of the Fourth Amendment. Cf. *People* v. *Grossman,* 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965); *People* v. *Beshany,* 43 Misc. 2d 521, 252 N.Y.S. 2d 110 (S. Ct. Queens Co. 1964). Cf. also *Draper* v. *United States,* 358 U. S. 307, 310 fn. 1; *United States* v. *Kancso,* 252 F. 2d 220 (C. A. 2, 1958); and *United States* v. *Vokell,* 251 F. 2d 333 (C. A. 2, 1958), cert. den. 356 U. S. 962, construing the "reasonable grounds" language in the Federal Narcotic Act arrest provision (28 U.S.C. § 7607) as meaning the same as "probable cause".

"• • • It is elementary that in passing on the validity of a warrant, the reviewing Court may consider *only* information brought to the magistrate's attention." *Aguilar* v. *Texas,* 378 U. S. 108, 109, fn. 1, citing *Giordenello* v. *United States,* 357 U. S. 480, 486. In the instant case the record of the proceedings on the motion to suppress suggests certain generalized implications by the prosecutor that the Judge who signed the *ex parte* eavesdrop orders (Sarafite, J.) was shown some data in addition to the

formal affidavits in support of the application (A55-A60, A85-A88, A90), but we do not think there is any serious doubt that the only items shown to Judge Sarafite were the formal affidavits; we so contended in both of the appellate courts below, without serious claim to the contrary by the prosecution. The affidavits referred to were of the most conclusory sort.

Let us first note the pertinent contents of the *ex parte* orders themselves. In the Exhibit 2 papers, relating to the Steinman eavesdrop (App. Supp. 8 *et seq.*), here is the sole language in Judge Sarafite's *ex parte* order (June 12, 1962) which goes to the question of what showing of "reasonable grounds" had been made to Judge Sarafite in support of the application for the Steinman eavesdrop order—

> "It appearing from the affidavits of David A. Goldstein and Alfred J. Scotti, Assistant District Attorneys of the County of New York, sworn to on June 11, 1962, that there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions that may take place in Room 801 located at 15 East 48th Street, in the County, City and State of New York; and the Court being satisfied as to the existence of said reasonable grounds, * * *"

Judge Sarafite's order (April 10, 1962) in the Exhibit 1 papers, relating to the Neyer eavesdrop (App. Supp. 3 *et seq.*), is in exactly the same form as the above Steinman order, referring to affidavits by Assistant District Attorneys Jeremiah B. McKenna and Alfred J. Scotti.

As regards the affidavits of the two Assistant District Attorneys (Messrs. Goldstein and Scotti) in the Steinman eavesdrop application (Supp. App. 8 *et seq.*), except for a reference in one paragraph to a "duly authorized eavesdropping device installed in the office of * * * Harry

Neyer," and an innocuous direct averment that Steinman was a prospective liquor license applicant and interested in certain nightclubs, all of the averments in the Goldstein affidavit are sheer unsupported conclusions based upon a general claim of or reference to "information" or "evidence" in the possession of the District Attorney's office; and Mr. Scotti's affidavit is merely an adoption by reference of Mr. Goldstein's. The McKenna affidavit with regard to the Neyer eavesdrop (Supp. App. 5 *et seq.*) follows the same conclusory pattern as in the Steinman eavesdrop papers, *viz.*, that the District Attorney's office has "information" or "evidence". And it will be especially noted that the McKenna affidavit (*ibid.*) does not refer to any antecedent eavesdrops or wiretaps, or indeed to any other evidentiary source. Mr. Scotti's affidavit *re* Neyer (*id.* 7) is in exactly the same form as in the Steinman papers (*id.* 12), i.e., it is merely an adoption by reference of Mr. McKenna's affidavit (*id.* 5) with an expression of "opinion" that "reasonable grounds" exist.

Again, in the Steinman eavesdrop affidavits (Exhibit 2—Supp. App. 8 *et seq.*) herein the sole reference to "source of the information" was "a duly authorized eavesdropping device installed in the office of the aforesaid Harry Neyer". But those affidavit averments for the Steinman eavesdrop application (*id.* 9) did not include any statement or suggestion that the Neyer eavesdrop was the "source" of any of the "information" or "evidence" conclusorily mentioned in those affidavits except the "evidence" that "conferences relative to the payment of unlawful fees necessary to obtain liquor licenses occur in the office of one Harry Steinman". Nor did the latter affidavits (*ibid.*) contain one word from which Judge Sarafite could have judicially evaluated the "reason for crediting" (this being this Court's language in the *Ventresca* case, *supra*), the Neyer eavesdrop "source"; i.e., evaluation of the audibility of the Neyer eavesdrop recordings, or of the reliability of the custodial chain, or of the accuracy of any "transcript", or, forsooth, evaluation of the sound-

ness of the District Attorney's conclusory description of what that otherwise undescribed and wholly unevaluated "source" had produced.

Nor did the People's affidavits for the Steinman eavesdrop (Supp. App. 9) contain one word in substantiation of the conclusory allegation that this amorphous item, the Neyer eavesdrop which was antecedent to the Steinman eavesdrop application, had in fact and in law been "duly authorized" as unsupportedly claimed by the District Attorney; it being an exceedingly critical question indeed in this case (see our further discussion, *infra*) whether the Neyer eavesdrop had been "duly authorized".

For—and we turn now to a more distinct examination of the Neyer eavesdrop-order papers themselves (Exhibit 1—*id.* 3 *et seq.*)—the Neyer papers do not even contain a fragmentary reference (as in the Steinman papers—*id.* 8 *et seq.*) to any prior eavesdrop but are drawn in a one hundred percent unrelievedly conclusory form. Totally ignored in the Neyer papers was the standard laid down by this Court in *Ventresca, supra,* that "reason for crediting the source of the information [be] given". The Neyer papers not only give no such "reason", they do not even give any such "source". Furthermore, even if this insuperable defect in the Neyer papers could be remedied (not here done) by some informal showing that Judge Sarafite was given information of pre-Neyer eavesdrops or minifons,* such in itself would not save the Neyer eavesdrop order as being in compliance with § 813-a (and with the Fourth Amendment) unless there had also been fully litigated to the satisfaction of Judge Schweitzer (in the suppression proceeding) all of the essential issues as to audibility, chain of custody of the machines and tapes, accuracy of "transcripts", etc.

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* We previously mentioned the minifon activities of the liquor licensee Panzini in conversations with Neyer and with Chairman Epstein's aide Klapper (A55-A60, A85-A88) as to which there is no satisfactory indication in this Record that these minifon items were adequately brought to the attention of or considered by the "magistrate" who issued the "warrants" (Judge Sarafite).

The foregoing refers primarily to the question of *what* "probable cause" allegations were contained in the papers shown to the "Magistrate" (Judge Sarafite) who issued the *ex parte* eavesdrop or "search" orders. Consideration must be given also to the Fourth Amendment search problem commonly referred to as the problem of "the reliability of the informer". *Draper* v. *United States,* 358 U. S. 307; *Jones* v. *United States,* 362 U. S. 257; *Henry* v. *United States,* 361 U. S. 98. See also *United States* v. *Ramirez,* 279 F. 2d 712, 715 (C. A. 2 1960), characterizing the *Jones* rule as being that "* * * the affiant must * * * demonstrate that the informant has established a reputation for reliability so as to be worthy of belief." The *Ramirez* Court went on to say that, "in addition, *Jones* may require that the affidavit include some factual information independently corroborative * * * (of the reliable informant)." Who was the "informant" in the present case? The Neyer eavesdrop-order-papers (Supp. App. 3 *et seq.*) are silent as to this, and the Steinman papers (*id.* 8 *et seq.*) contain only the previously noted conclusory reference to the allegedly "duly authorized" prior eavesdrop in Neyer's office. True, the People suggested or implied in our motion to suppress proceeding that the "informant" consisted of a certain chain of minifons and eavesdrops, but we would now add to our previous remarks on this item as follows: The ultimate "genesis" item is said to have been the Panzini-Klapper-Neyer minifons (A55-57). Was Panzini a "reliable" minifon functionary? What is Panzini's character background? Did he operate the minifon correctly, was the custody of the instrument and its recording spool "reliable"? The present record contains answers to none of these questions as to the antecedent minifon activity, yet without satisfactory judicial evaluation of all of this (as well as of the "reliability" of the subsequent eavesdrops and of the individuals involved therein and in the custody thereof, and of the "reliability" of the minifon "transcripts"), how could either Judge Sarafite (or Judge Schweitzer, the Trial Judge,

in the motion-to-suppress proceeding) decide, respectively, to grant in the first instance and to sustain subsequently the eavesdrop orders?

The Fourth Amendment decisions preclude the giving of any weight to any "afterthought" suggestion on the part of the People in this case that they *could have* justified the Neyer and Steinman eavesdrop applications on the basis of anterior minifons of which the People had knowledge but which we claim were not evaluatingly passed upon by Judge Sarafite and which undisputedly were not thus passed upon by Judge Schweitzer. *Jones* v. *United States,* 357 U. S. 493; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *United States* v. *Pollack,* 64 F. Supp. 554, 558 (D.N.J., 1946—per Forman, J.).

In any event the Neyer eavesdrop papers, being completely barren as to *any* source of the alleged information or evidence, are fatally deficient on their face under the "reasonable grounds" test of § 813-a when that statute is construed, as it must be, to conform with the Fourth Amendment. If the Neyer eavesdrop papers were bad then both the Neyer and Steinman eavesdrops and *all* of the evidence and leads upon which this prosecution is concededly dependent are bad. This is true both because the Steinman eavesdrop was expressly sought to be justified solely on the basis of the "duly authorized" Neyer eavesdrop, and because it is impossible to segregate the evidence and leads derived from the two eavesdrops. Moreover, the Neyer eavesdrop being earlier in time, its taint would infect all subsequent derivations.

We therefore submit that, even if N. Y. Code Crim. Proc. § 813-a were not subject to the larger constitutional infirmities described under our Reason "I", *supra,* its application in the instant case would be violative of the Fourth Amendment for failure to satisfy the requirements of probable cause in regard to the showing made before the "Magistrate" who issued the *ex parte* eavesdrop

orders; and that a permissive State eavesdrop statute sought to be applied in a manner so flagrantly violative of the most elementary requirements of Fourth Amendment probable cause must be disapproved by this Court through the exercise of its certiorari jurisdiction lest otherwise permissive State legislation designed for the awesome purpose of "validating" trespassory electronic eavesdrops in the private room premises of private individuals receive unmerited and premature constitutional approbation by default, as it were.

III

The by-product eavesdropping of telephone conversations which occurred in this case must fall together with the trespassory room eavesdrops, notwithstanding the abstemiousness which has heretofore apparently been favored by this Court with regard to State telephone wiretapping as tested by the Fourth Amendment and the Federal Communications Act. Contrast *Benanti* v. *United States,* 355 U. S. 96, with *Schwartz* v. *Texas,* 344 U. S. 199. It seems self evident that when an electronic room-space eavesdrop is operating in a room where there is a telephone, the room eavesdrop will audit the voices of persons in that room who are speaking into the telephone instruments in that room, and exactly that did happen here. The District Attorney installed and used each of the electronic eavesdrops here as a single combined or integrated eavesdrop operation to audit both non-telephonic and telephonic conversations, and the *ex parte* court orders herein were likewise applied for and granted on such combined or integrated basis. In short, the prosecution deliberately planned to and they did engage in electronic eavesdropping here on a basis in which it did not matter to them whether the conversations which they picked up were eavesdropped as to the telephone or the room. Telephone conversations were not only picked up on the room "bug" as a matter of sheer practical and physical inevitability, but such was

the deliberate design. When all of this is perceived, does not the conclusion become inescapable that the telephone eavesdropping in this case is fatally tainted with unconstitutionality derived both from its sheer physical or technological assimilation into the room eavesdrops, and from its having been an integral and non-severable part of a deliberate design that included the indubitably unconstitutional room eavesdrops? The People are in no position to urge that the particular telephone eavesdropping here involved may be entitled to be salvaged on some basis of distinctness from the room eavesdrops, because the District Attorney himself deliberately chose to make the two forms of eavesdrop indissoluble in this case. That choice should be treated as irrevocable under the Constitutional standards by which this case has to be decided. And we therefore submit that, all other considerations or possible distinctions notwithstanding, the telephone eavesdropping herein must fall together with the room eavesdrops.

IV

We are keenly aware that in criminal cases where conviction has been secured on the basis of sound recordings the reviewing Courts practically take it for granted that they will have to hear an argument about audibility of the recordings; an understandable attitude of conditioned judicial skepticism may confront the party who offers such argument. We respectfully assure this Court that despite our awareness of this "fact of life", we feel absolutely justified in making the argument of inaudibility in this case because the record proofs in support thereof seem to us overwhelming, and because larger due process implications seem to us to be relevant for the purpose of evaluating the combined Fourth Amendment and due process fairness of the permissive State eavesdropping system here sought to be enshrined in our Public Law.

As earlier stated, the recording which was played for the Jury in this trial was a single tape, Exhibit 61-A (A765,

et seq.). It purportedly contained conversations of June 28 and 29, 1962 at Harry Steinman's office between Steinman and petitioner Berger on June 28, and Steinman, petitioner Berger and Jacklone on June 29. The conversations of both of those days allegedly dealt with the Jacklone-Tenement matter. The conversations of June 28 allegedly dealt also with the Playboy matter.

Before any recording was played for the Jury the Trial Court held a "dry run" playing, attended by three court stenographers to test audibility (A375-376, 937-1030). This dry run covered tapes additional to the one which eventually went into evidence and was played for the Jury, and apparently the Court itself concluded that two such other tapes offered by the People were so hopeless that they must be excluded (A425). The remaining tape, Reel No. 5483 (Exhibit 61-A), did not deserve any greater favor. The dry run was on October 15, 1964. On October 19 defense counsel reported to the Court that the stenographers were not making any transcripts at all because they understood that it was the Court's instruction not to transcribe what they could not hear (A375). The Court replied, "I did have a complaint from each of the three reporters, expressing their difficulty in making a transcription because of their inability to hear what was said, and I did say, 'Well, you can't transcribe what you didn't hear'" (A376). The District Attorney interposed, by way of egregious understatement, we must say, that "There are portions of the tape that are inaudible", and he asked for another try, with earphones, before any transcribing was attempted (A376), but the Court directed that the dry run recordings be transcribed "for whatever they are worth" (A376).

We devoted nearly one hundred printed pages at the end of the second volume of our printed appendix in the Court below (A937-1030) to the respective transcriptions by the three stenographers of both the dry run of October 15, 1964 and of the evidentiary courtroom playings of the

recording for the Jury on October 20, 1964; these transcriptions are in addition to the evidentiary transcription that was made for the purposes of the official trial record (A766-785).* No recital can substitute for the raw text itself of these appalling transcriptions when each one is read from beginning to end and when the entire reading is done within a sufficiently short span of time to give the reader the "benefit" of a panoramic comparison. In virtually every item in the recording as transcribed by the several stenographers one would scarcely know that the stenographic auditors had been listening to the same words. If there was ever a case in which an electronic eavesdrop recording was manifestly worthless as "evidence" it was here.

The facts elicited by the defense cross examination of the police wiremen in the conducting of the eavesdrops in Steinman's office pointed unmistakably to the altogether predictable conclusion that the recordings must turn out to be worthlessly flawed.

For example, Detective Boleslaw Baransky, when asked whether the building where Steinman's office is located had structural aspects which would adversely affect the fidelity of electronic eavesdropping mechanisms, said that he did not know (A573). He also did not know whether there were air conditioners in Steinman's office (A574). He had no information about the power system for the elevators in the building, and he admitted that elevator noise could affect the microphone or "bug" device here used (A575). Nor had he made any check as to compressors in the building, which he admitted also could

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* As just noted, the transcriptions printed at A937-1030 include, in addition to the three separate dry run transcriptions of October 15, 1964, a transcription by each of the same three stenographers during the evidentiary playing of the recording at the trial on October 20, 1964. That is, the evidentiary "run" was taken down not only by the regular court stenographer assigned to the trial at that time but also by the three stenographers who had taken the dry run on October 15.

affect the microphone (A576). He did not even know when or whether he had checked the "ordinary little six-volt storage battery" which was the only power source for the microphone, and which had been installed on June 16, 1962, nearly two weeks before the particular eavesdrop days here involved (A576-577). He had no idea as to what might be the effect of passing automobiles with radios in operation experiencing "drift" and generating static, and he admitted that this could cause interference (A578-579). He had made no check whatsoever of conditions of power surge in the location (A579). He had not even made a test of transmission and reception when the recorder was hooked up, which was two days after the microphone was installed (A580). He was flatly "unable to say", as to these various types of interference, whether they had affected this microphone (A581-582).

On the all important question—i.e., important for compliance with the minimum legal standards for authentication of sound recordings (see authorities, *infra*)—of whether anyone engaged in the electronic eavesdropping activity had been able in person to hear any significant items as received over the wiring system, in other words whether the recording had been meaningfully audible to the human ear at the time it was coming through the microphone, we find in the trial record testimony by only one witness, Detective Reilly, and this limited to only the eavesdropping of June 28, 1962, and consisting of only the meaningless fragments appearing at A548-550.

Of perhaps even greater interest than the foregoing was the testimony of the several detectives who participated in making "accurate transcripts" of the recordings. See A618-621, 624-652, 653-657, where it is brought out that the preparation of the "accurate transcripts" by the detectives had involved literally many hundreds and perhaps thousands of re-playings of the tape, continual multimutual corrections and emendations of notes among the respective several detectives aiding each other, and in

the final product there stil remained numerous gaps and uncertainties.

A proper foundation must be laid before electronic recordings are allowed in evidence. The leading treatment of this subject is the Annotation in 58 A.L.R. 2d 1024, "Admissibility of Sound Recordings In Evidence", See especially § 7 ("Omissions and Inaudibility"), and see also § 4 ("Necessity and Manner of Authentication"); the several volumes of "A.L.R. 2d Supplement Service" contain considerable additional significant case law on this subject, the original Annotation in volume 58 having been published in 1958. The Annotation points out that one of the cardinal requirements for authentication of a recording is that a human listener shall have been able to hear the sounds received by the recording mechanism (see § 4 of the above mentioned annotation). We have above noted the flimsiness of the People's sole proof on this aspect—the testimony of Detective Reilly of hearing a few fragments on June 28, 1962 (A548-550).

The frequency with which imperfect recordings do receive judicial acceptance in this country prompts us to comment as follows: Would the courts of this country tolerate, in the proffering of any other form of evidence, for example, documentary evidence, such physical imperfections, such pervasive lacunae, such fragmentation and shredding and all-around spoilage of the "text", such clumsy mutilation, such net undecipherability as in the eavesdrop recordings here involved? Would our courts tolerate, in any documentary proof, or in any human witness' memory on the stand, this patchy, disintegrated sort of probativeness? What is there about electronic eavesdropping that should so often endow it, above all other modes of proof, with such a unique undeclared but effective immunity from the traditional rules of Anglo-American judicial proof? Electronic eavesdropping, because of its offensiveness to the civilized decencies of a free society, and not less because of its susceptibility to "gaps" and "inaudible parts" as

is so dramatically instanced in this case—why is it that one never seems to get audible police recordings which are *exculpatory* of a defendant—ought to be treated, under the tests of probativeness, as the lowest, not the highest quality of proof is treated.

If permissive State statutory systems for electronic room "bugging" are to be seriously considered by this Court as deserving Fourth Amendment approval, we submit that one indispensable factor which should enter into this important constitutional inquiry in any particular case is the intrinsic probative unreliability of the recordings, a factor so vividly present in this case.

V

In the light of the above stated Reasons for the granting of the writ, we may now re-formulate the issue of the Fourth Amendment tolerability of the New York State permissive eavesdrop legislation as applied in this case.

Analogies drawn from the area of search warrants as such are not likely to be controlling in the room eavesdrop area, for permissive court orders as to such eavesdrops would in their nature continue to be secret and *ex parte* both in the stage of the obtaining of such orders and in the stage of the execution thereof, whereas search warrants of course may not be secretly executed. Nor may search warrants ever allow a search for "mere evidence" as appears to be allowable under the permissive *ex parte* court-order procedures of § 813-a, Code Crim. Proc. Above all, the search warrant analogy is useless because eavesdropping *ipso facto* effects a "general search" of *all* conversation during the eavesdropping, whereas search warrants must specify exactly what is to be "searched" and "seized".

The peculiar constitutional odiousness of the room eavesdropping activity in this case cries out for certiorari cor-

rection. If ever there is going to be a case in which permissive room eavesdrop procedures comparable to those in § 813-a may be sustained as constitutional by this Court, it should not be a case in which such a statute has been held by the State Courts to permit the procedural slackness, the conclusoriness of affidavit averments, the failure even to aver much less to substantiate the reliability of any sources of alleged information, the "bootstrap" use of a whole evolving series of eavesdrops generating one another, the dragnet character of the "search", and the profoundly unsatisfactory probative quality of the "recordings". The Fourth Amendment should not be thus lightly overborne.

VI

Petitioner was denied a fair trial, and his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Federal Constitution, by the admission in evidence of certain cards containing allegedly inculpating information which the police seized while they had petitioner under unlawful custody, petitioner having unmistakably manifested his unwillingness to surrender the cards, and all of this having occurred in the absence of petitioner's counsel.

Over defense objection the Trial Court admitted into evidence People's Exhibits 56 and 57 (A505-512), being two cards belonging to Berger which contained telephone numbers and addresses of Epstein and Neyer (A512). In December 1962, when the SLA investigation "broke", the District Attorney went about obtaining a reciprocal witness order against petitioner Berger, who was in Chicago. An Assistant District Attorney and two detectives traveled to Chicago for this purpose, and a small army of the New York and Chicago police descended upon Berger, haled him down to a Chicago courthouse to "execute" the reciprocal-witness papers with a view to his return to New

York, and, while they had him in the courthouse, the following occurred in a corridor, according to one of the New York detectives (Cronin): Berger, acting in a manner of concealment, took two cards out of his pocket, tore them into small pieces, and threw them away, one into a side doorway and the other into a trashcan. Detective Cronin retrieved the pieces, and at the trial the People through him introduced the re-pieced items as Exhibits 56 and 57. See A502-535.

When the defense objected to the introduction of these exhibits, the District Attorney stated that the items were offered on a theory of "evidence of guilty knowledge" (A503).

The defense unavailingly tried to probe thoroughly into the circumstances of Berger's police custody in Chicago on the occasion in question, with a view to showing that the custody itself was illegal in that the reciprocal witness procedure had not been justifiably invoked and in that at the time of the apparent arrest and custodial detention of Berger the reciprocal witness processes had not advanced to any point that would justify such assertion of physical authority by the police. The defense also wanted to probe into the matter of Berger's having been denied opportunity for the assistance of counsel during these detentional assertions by the police The defense wanted to go into these matters for the declared purpose of enabling the Trial Court to determine whether, in the overall circumstances presented, there had been a denial of Berger's rights against search and seizure and self-incrimination and of his right to the assistance of counsel in connection with the episode of the torn-up cards and the police retrieval thereof (A503-535, 553-557).

The reason given by the Trial Court for blocking off this entire defense effort with respect to the item of the torn-up cards was that there had been an "abandonment" of the

cards by petitioner Berger, and that therefore no problem of a search and seizure could arise (A526).

The "abandonment" suggestion, even if *arguendo* it reaches the search and seizure issue (which we deny—see our next paragraph) does not reach the issue of denial of the assistance of counsel. Cf. *Escobedo* v. *Illinois,* 378 U. S. 478—i.e., Petitioner Berger's trial commenced in December 1964 (see *Johnson* v. *New Jersey,* —— U. S. ——, 16 L. Ed. 2d 882).

In any event, the "abandonment" theory is unrealistic in the present situation. For Fourth Amendment purposes, is there any difference between a man's clutching a piece of paper inside his pocket to prevent a police seizure thereof, and his, let us say, swallowing the paper to prevent such seizure? By putting the paper in his stomach the man is *destroying* it, *i.e.,* manifesting his intention that the police shall not get it or see it; he is refusing, then, to "consent" to the search and seizure when he *destroys* the paper by putting it in contact with the digestive juices of the stomach. Is the situation different in any meaningful Fourth Amendment aspect when a man destroys a paper that he does not want the police to get or see, by concealedly tearing it into bits and throwing it into a concealed place? How, in the World of the Fourth Amendment, can such an action be called an "abandonment" of the subject matter of the search and seizure?*

The Jury in this luridly publicized and deliciously scandalized case were allowed, by the Court's ill-advised ruling concerning Exhibits 56 and 57, to savor the alleged

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* The "abandonment" in *Abel* v. *United States,* 362 U. S. 217, 241, was distinguishable. There the items had simply been left as "bona vacantia" in a waste paper basket in a hotel room which Abel had vacated. And indeed in *Rios* v. *United States,* 364 U. S. 253, 262 fn., the dropping of a package by a taxicab passenger on the floor of the vehicle was held *not* an "abandonment" and *Abel* was distinguished.

incident of Berger's "guilt-conscious" attempt to throw away "written proof" of his "connection" with the "villains" Epstein and Neyer, at a moment when Berger "feared" that the police "had him". (Our use of quotation marks in the last sentence is rhetorical, of course.) The Jury should never have been allowed to hear this inflammatory and tendentious business about Berger's alleged conduct on the day in question in Chicago, because too many constitutional values had to be trampled down before this prejudicial item could be placed upon the trial record.

VII

Petitioner was denied a fair trial by the Trial Court's permitting the prosecution to question the Playboy-officer witnesses as to whether they had invoked the privilege against self-incrimination before the Grand Jury.*

In order to appreciate the full import of the prejudicial error in permitting the Playboy witnesses to tell the Jury that they had invoked the privilege against self-incrimination before the Grand Jury, it is necessary to understand that the sole even ostensible justification adduced by the prosecution and the Trial Court for importing this elementarily prejudicial testimony into this trial record was that, since the defense was contending that the Playboy people sincerely believed they were not guilty of bribery but were victims of extortion,** the prosecution must have the right to negate this attitude of the Playboy people by showing that they (the Playboy people) had themselves feared they might be guilty of bribery, and that their

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* The theory of this conspiracy case, it will be recalled, is that Berger conspired with the Playboy Club officers (and Jacklone) to bribe Epstein, the SLA chairman.

** An issue which the defense considered important under State law. See Point IV in the printed "Appellant's Brief" in the court below.

use of the privilege before the Grand Jury revealed this fear. On this "reasoning" the Playboy witnesses Preuss (A347-350), Lownes (A392-394) and Morton (A716-717) were allowed to tell the Jury that they had used the privilege before the Grand Jury. All this was over the most vigorous defense objection (*ibid.*; see also A714-715, 722-731, 902-903).

The flimsy pretext for allowing this testimony should not be allowed to override the rule that reliance on the constitutional right to remain silent cannot be used as an admission of guilt (*Grunewald* v. *United States*, 353 U. S. 391); i.e., here, *a fortiori*, there was an attempt (regrettably successful) to prejudice the defendant on trial (petitioner Berger) *imputedly* or *vicariously*, as it were, by proof of alleged "guilt-admissions" on the part of co-conspirators *via* their having used the privilege against self-incrimination.

In its instructions to the Jury, at A866 (cf. A848-849), the Trial Court lent further emphasis to this improperly admitted Grand Jury testimony of the Playboy witnesses. The defense excepted to this at A902-903, and requested a corrective instruction, which was refused.

If, as is the law (*e.g.*, *Namet* v. *United States*, 373 U. S. 179; *People* v. *Levy*, 15 N. Y. 2d 159), it can give rise to prejudicial error to permit a prosecutor to call to the stand in a criminal case a witness who, it is known in advance (by the prosecutor), is going to invoke the privilege against self-incrimination on the stand, is it not even more prejudicial for the prosecutor deliberately to call to the stand an expressly named "co-conspirator" for the purpose of having such accomplice witness tell the Jury that he had recently used the privilege against self-incrimination with respect to the very same subject matter for which the defendant is on trial on a charge of conspiratorial complicity with that very witness?

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner Ralph Berger.

APPENDIX A

Remittitur (Order) of the Court of Appeals of the State of New York sought to be reviewed.

REMITTITUR

No. 250

FILED

Jul 18 1966

SUPREME COURT

NEW YORK COUNTY

APPEAL BUREAU

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS, The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur July 7, 1966

Appendix A.

1. No. 250. 66

THE PEOPLE &c.,

Respondent,

vs.

RALPH BERGER,

Appellant.

BE IT REMEMBERED, That on the 20th day of May in the year of our Lord one thousand nine hundred and sixty-six, Ralph Berger, the appellant- in this cause, came here unto the Court of Appeals, by Joseph E. Brill, his attorney-, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Sureme Court in and for the First Judicial Department. And The People &c., the respondent- in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Joseph E. Brill, of counsel for the appellant-, and by Mr. H. Richard Uviller, of counsel for the respondent-, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surpeme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(SEAL)

APPENDIX B

Memorandum report of affirmance of Court of Appeals of the State of New York, including dissenting opinion (18 N. Y. 2d 638).

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. RALPH BERGER, Appellant.

Argued June 2, 1966; decided July 7, 1966.

Crimes—bribery—eavesdrop evidence—defendant was convicted, on two counts, of conspiracy to bribe official of State Liquor Authority to influence him in respect to issuance of liquor licenses—contentions by defendant that orders which permitted eavesdropping, as result of which concededly necessary evidence was obtained against him, were invalid because based upon inadequate showing of "reasonable grounds" for granting them, that "room type" eavesdrops were unconstitutional, that his conviction was based upon inaudible, incomplete and garbled recordings of electronic eavesdrops and equally incompetent transcripts thereof, that, if based on anything, People's proof was based on extortion situation, that certain cards were obtained as result of unlawful search and seizure, and that he was deprived of fair trial by reason of prejudicial conduct of prosecution and trial court—judgment of conviction was properly affirmed.

People v. *Berger*, 25 A D 2d 718, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 17, 1966, affirming a judgment of the Supreme Court at a Special and Trial Term (MITCHELL D. SCHWEITZER, J.), rendered in New York County upon a verdict which convicted defendant, on two counts, of

conspiracy in violation of section 580 of the Penal Law. The indictment charged that, during periods from, in the first count, the end of May, 1962 until on or about June 29, 1962 and, in the second count, from on or about July, 1960 until on or about December 7, 1962, defendant and others conspired to bribe a public officer attached to the New York State Liquor Authority, with intent to influence him in respect to the issuance of licenses to sell liquor at, in the first count, a supper club known as the Tenement, and, in the second count, a Playboy Club located in New York County. At a pretrial hearing upon a motion to suppress evidence, which was denied, the People stipulated that, without the evidence and leads obtained from eavesdropping devices which had been placed in two offices under the authority of ex parte court orders issued pursuant to section 813-a of the Code of Criminal Procedure, the District Attorney would have had no information upon which to present a case against defendant with respect to the crimes charged in the indictment. In the Court of Appeals defendant argued that the ex parte court orders which permitted eavesdropping in the two offices were invalid under section 813-a of the Code of Criminal Procedure because they were based upon an inadequate showing of "reasonable grounds" for granting them; that the eavesdrops, which were of the "room type", rather than "telephone wire tap type", were unconstitutional as an intrusion into private premises; that the conviction was based upon inaudible, incomplete and garbled recordings of electronic eavesdrops and equally incompetent transcripts of said recordings; that, if it was based on anything, the People's proof was based upon an extortion, rather than a bribery situation; that cards containing telephone numbers and addresses, which had been torn up and thrown away by defendant and then retrieved by the police, were obtained as the result of an unlawful search and seizure; that the trial court erred

in permitting the prosecution, in its redirect examination of certain of its witnesses, to question them as to whether they had invoked the privilege against self incrimination before the Grand Jury; that defendant was denied a fair trial by other prejudicial conduct of the prosecution and trial court and that, while the People were laying the foundation for the eavesdrop proof, the trial court had unjustifiably discharged a juror on the ground of his expression of an attitude of disfavor concerning electronic eavesdrop testimony.

Joseph E. Brill and *Bernard J. Levy* for appellant.

Frank S. Hogan, District Attorney (*H. Richard Uviller, Alan F. Leibowitz* and *Jeremiah B. McKenna* of counsel), for respondent.

Judgment affirmed; no opinion.

"Chief Judge DESMOND and Judge FULD dissent and vote to reverse on the ground that the electronic eavesdrops inside two offices, one of which was a law office, were unconstitutional under the Fourth Amendment and a physical intrusion into private premises and as a "general search" for evidence. (See *Siegel* v. *People*, 16 N Y 2d 330, 333, per DESMOND, Ch. J. [dissenting]; *People* v. *McCall*, 17 N Y 2d 152, 161, per DESMOND, Ch. J. [concurring]; *People* v. *Grossman*, 45 Misc. 2d 557; cf. *Stanford* v. *Texas*, 379 U. S. 476; *Silverman* v. *United States*, 365 U. S. 505.)"

APPENDIX C

Points urged by petitioner Ralph Berger in Appellate Division (quoted from table of contents of printed "appellant's brief" in latter court).

ARGUMENT:

POINT I—A. The *ex parte* court order which permitted eavesdropping in the private office of Harry Steinman —as well as the order which permitted eavesdropping in the private law office of Harry Neyer—was invalid under Code Crim. Proc. § 813-a because based upon an inadequate showing of "reasonable grounds".

B. Since this case involves the room type of eavesdrop (not merely telephone wiretapping), which is notoriously the most constitutionally disfavored type of electronic eavesdropping because it is a trespassory intrusion into private premises, and since even if *arguendo* some constitutionally acceptable statutory system may be devisable for such trespassory eavesdropping on a permissive basis by *ex parte* court order it would have to be a system which does not lend itself to slack or constitutionally dubious use, and since also the application of § 813-a sought to be justified by the People in this case involves circumstances of the extremest constitutional offensiveness owing to the gross inadequacy of the showing of "reasonable grounds", it would be not only in the interest of legal and constitutional justice to the appellant Berger himself but would also accord with the judicial tradition of avoiding constitutional nullification of a statute when such is not needed for the decision of the particular case, for this Court to reverse the judgment of conviction herein on the purely statutory ground that the "reasonable grounds" requirement of § 813-a was not satisfied in this case.

Appendix C.

POINT II—The Neyer and Steinman room eavesdrops were unconstitutional under the Fourth Amendment as a trespassory intrusion into private premises. These eavesdrops and the use made of them in instituting and conducting this prosecution worked a denial of defendant Berger's rights under the Fourth, Fifth and Fourteenth Amendments.

Introductory to Point II.

Authorities re the Constitutionality of Trespassory Room Eavesdrops.

POINT III—The defendant-appellant was denied a fair trial because he was convicted on the basis of incompetent evidence consisting of recordings of electronic eavesdrops which were pervasively inaudible, incomplete and garbled, and because the Court permitted the prosecution to resort to likewise incompetent and unfair artificial aids to rehabilitate the probatively worthless recordings and to endow them with synthetic authenticity.

POINT IV—A. The defendant-appellant was denied a fair trial because the conviction for conspiracy to bribe was obtained upon proofs not looking to a bribery situation at all but, if anything, to an extortion situation.

B. The unfairness and prejudice arising from this unjustified substitution of the bribery charge for an extortion charge, arises not merely from such substitution and from the illegality thereof in itself. The case involves the further *concrete* illegality and injustice that a mass of hearsay testimony by alleged bribery co-conspirators was received in evidence, and such

testimony would of course have been inadmissible in an extortion case where these alleged bribery co-conspirators would have had the status instead of extortion victims.

C. A further prejudice and illegality arising from the improper substitution of bribery for extortion charges is that thereby a synthetic joinder of offenses was devised. The two conspiracy counts in this indictment, involving what in actuality (under the People's trial proofs) were two entirely separate and distinct sets of extortion victims, could properly have been joined in a single indictment only under a theory of extortion (or conspiracy to commit extortion). It was misjoinder of offenses in the rankest sense to join Berger with the alleged Playboy bribery co-conspirators and the alleged Jacklone-Tenement bribery co-conspirators in a single indictment.

POINT V—The defendant-appellant was denied a fair trial, and his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Federal Constitution, by the admission in evidence of certain cards containing allegedly inculpating information which the police seized while they had the defendant under unlawful custody, the defendant having unmistakably manifested his unwillingness to surrender the cards, and all of this having occurred in the absence of defendant's counsel.

POINT VI—The defendant-appellant was denied a fair trial by the Trial Court's permitting the prosecution to question the Playboy-officer witnesses as to whether they had invoked the privilege against self-incrimination before the Grand Jury.

Appendix C.

POINT VII—The defendant-appellant was denied a fair trial by other prejudicial conduct of the prosecution and the Court.

POINT VIII—The judgment should be reversed on the ground that it was in violation of the defendant-appellant's constitutional right to be protected against double jeopardy, or at the very least there was a denial of fair trial, in that the Court unjustifiably discharged a juror in the middle of the trial on the ground of the juror's expression of an attitude of disfavor or disinclination concerning electronic eavesdrop testimony.

APPENDIX D

Points urged for petitioner Ralph Berger in Court of Appeals (quoted from table of contents of printed "appellant's brief" in latter court).

ARGUMENT:

POINT I—A. The *ex parte* court order which permitted eavesdropping in the private office of Harry Steinman —as well as the order which permitted eavesdropping in the private law office of Harry Neyer—was invalid under Code Crim. Proc. § 813-a because based upon an inadequate showing of "reasonable grounds".

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Appendix D.

The question raised by the People in the Appellate Division as to appellant Berger's standing to challenge the Neyer eavesdrop.

POINT II—The Neyer and Steinman room eavesdrops were unconstitutional under the Fourth Amendment as a trespassory intrusion into private premises. These eavesdrops and the use made of them in instituting and conducting this prosecution worked a denial of defendant Berger's right under the Fourth, Fifth and Fourteenth Amendments.

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co-conspirators was received in evidence, and such testimony would of course have been inadmissible in an extortion case where these alleged bribery co-conspirators would have had the status instead of extortion victims.

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POINT V—The defendant-appellant was denied a fair trial, and his constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Federal Constitution, by the admission in evidence of certain cards containing allegedly inculpating information which the police seized while they had the defendant under unlawful custody, the defendant having unmistakably manifested his unwillingness to surrender the cards, and all of this having occurred in the absence of defendant's counsel.

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Appendix D.

POINT VII—The defendant-appellant was denied a fair trial by other prejudicial conduct of the prosecution and the Court.

POINT VIII—The judgment should be reversed on the ground that it was in violation of the defendant-appellant's constitutional right to be protected against double jeopardy, or at the very least here was a denial a fair trial, in that the Court unjustifiably discharged a Juror in the middle of the trial on the ground of the Juror's expression of an attitude of disfavor or disinclination concerning electronic eavesdrop testimony.

APPENDIX E

Statutes Involved

1. 47 U.S.C. § 605

§ 605. Unauthorized publications or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publish-

ing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

2. N. Y. Code Crim. Proc. § 813-a

§ 813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event

of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L. 1958, c. 676, eff. July 1, 1958.

3. N. Y. Code Crim. Proc. §§ 813-c to 813-e

§ 813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, § 1, eff. April 29, 1962.

§ 813-d. Time of making and determination

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to

trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses; the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, § 1; L.1964, c. 490, eff. July 1, 1964.

Appendix E.

§ 813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, § 1, April 29, 1962.